IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1166 of 1999

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANTABEN NARANBHAI DALVADI

Versus

VADILAL KACHARABHAI PRAJAPATI

Appearance:

MR AM RAVAL for Petitioners

MR MB GANDHI for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 31/08/1999

ORAL JUDGEMENT

1. This is a revision under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 at the instance of the heirs of the original tenant, challenging the decree of eviction passed against them by the rent court, which has been confirmed in appeal. In

such revision the jurisdiction of this court is extremely limited. The Supreme Court has laid down the scope and powers of the High Court while entertaining such revisions under section 29(2) of the Bombay Rent Act. The Supreme Court in the case of Patel Valmik Himatlal & Ors. Vs. Patel Mohanlal Muljibhai (1998(2) GLH 736) = AIR 1998 SC 3325), while approving and reiterating the principles laid down in its earlier decision in the case of Helper Girdharbhai Vs. Saiyad Hohmad Mirasaheb Kadri (AIR 1987 SC 1782), held that High Court cannot function as a court of appeal, cannot reappreciate the evidence on record, cannot discard concurrent findings of fact based on evidence recorded by the courts below, and cannot interfere on grounds of inadequacy or insufficiency of evidence, and cannot interfere, except in cases where conclusions drawn by the courts below are on the basis of no evidence at all, or are perverse. A different interpretation on facts is also not possible merely because another view on the same set of facts may just be possible.

2. Only certain factual contentions require to be noted.

3. It was contended by the petitioners-tenants (who are the heirs of the original tenant and who are brought on record on the demise of the original tenant during the pendency of the suit) that this very landlord-plaintiff had earlier filed a suit for eviction against the original tenant on the same ground viz. under section 13(1)(l) of the Bombay Rent Act (amongst other grounds). It was contended that in the said suit the landlord had sought for a decree under section 13(1)(l) of the said Act on the ground "that the tenant after the coming into operation of this Act has built, acquired vacant possession of or been allotted a suitable residence", and that such suit had been dismissed including on this ground. It is, therefore, contended that in the present suit the landlord has raised the same ground against the tenant, and therefore this suit is barred by principles of res-judicate.

3.1 This contention of learned counsel for the petitioner must fail inasmuch as the very concept of res-judicata has been misunderstood and/or misapplied. There is no controversy that the parties to the earlier suit and in the present suit are the same. There is also no controversy that the cause of action and the ground for seeking a decree is also the same. However, what is relevant and what distinguishes the previous suit and the present suit is the subject matter of dispute viz. the

identity of the property in question. In the earlier suit the landlord had alleged that the tenant had acquired other premises which consisted of ground floor and first floor, and in the said suit it was found that the tenant had possession of only the first floor. As against this, in the present suit the landlord has contended that the tenant has, by renovation and substantial expansion of the very same premises, rebuilt the same and that therefore now the tenant has, within the meaning of section 13(1)(l), acquired premises which consist of a Cellar of two rooms, ground floor of two rooms, with two rooms on first floor and second floor respectively. Thus, so far as the second suit viz. the instant suit is concerned, the identity of the property is substantially different although the location and situs may be the same. It is relevant to note that the cause of action which is referable to section 13(1)(l) of the Act only requires that the tenant should have acquired other suitable accommodation. It is this "other suitable accommodation", which has to be considered in the context of the earlier suit and the present suit. The mere fact that the location of the property is the same, does not make it the same property. In the earlier suit it was a question of ground floor and first floor consisting of one room each, and where the ground floor was not in possession of the tenant. In the instant case the property which the tenant is shown to have acquired is two rooms in the cellar, two rooms on the ground floor plus the first floor (two rooms) and second floor (two rooms) respectively. In my opinion, when there is substantial difference between the nature of the property, the extent of the property and the distribution of the property amongst the various floors, it cannot possibly be urged that the identity of the property in the first suit is the same as the identity of the property in the present suit. For this reason the principle of res judicata would not apply.

4. It may be pointed out here that the learned counsel for the petitioner has consistently referred to the second floor as a "cabin". In fact the Commissioner's map on the record of the case shows that the second floor consists of a big bed room, a small room attached thereto, an attached balcony, an attached bathroom and a loft. This arrangement cannot possibly be referred to as a "cabin".

5. It was next contended by learned counsel for the petitioners that this acquisition of property cannot be said to be property acquired by the tenant inasmuch as it is an acquisition by the wife of the tenant (subsequently

she became the widow), and that therefore section 13(1)(l) of the said Act would have no application to the facts of the case.

5.1 In the context of this submission the factual findings recorded by the courts below require to be examined. The trial court has found that the plaintiff landlord has failed to establish that the property has been acquired or constructed by the original tenant Naranbhai within his own funds. On the basis of this finding it could perhaps legitimately be urged that the property was acquired or constructed by the wife (later on the widow) of the tenant. In fact, according to learned counsel for the petitioner this is a finding of fact recorded by the trial court and not disturbed by the lower appellate court. Even if this be so and even if it be found that the property was acquired or recosntructed out of the funds of the wife of the tenant, it would not alter the legal position inasmuch as the tenant could still be said to have acquired suitable accommodation since the property which technically belongs to his wife is still available to him and his family, on the facts and circumstances of the case.

5.2 This is precisely the principle laid down by this High Court in the case of Hasmukhlal R. Shah Vs. Arvindbhai M. Kapadia, reported in 1988(1) GLH page 122 (Coram: M.B. Shah J. as he then was).

5.3 After discussing the relevant case law on the subject, this decision observes in para 6 thereof as under:

> "In my view, with regard to the interpretation of Section 13(1)(l) also, the same would be the position. If there is evidence on record that tenant and his family members are living together, one of them has acquired suitable residential accommodation and if there is no evidence to the effect that they had not been looking upon themselves as one unit or when the members of the family live together, mess together, then, acquisition of suitable residential accommodation by one of them would be considered to be the acquisition of suitable residential accommodation by the tenant. The position might be different in some cases. In the cases where the husband and wife are staying separately because of the dispute or for some other reason or where the son is staying in other premises because of the dispute or because after

> marriage he might consider that he should reside separately and acquires other suitable residential accommodation, then in those cases it can be said that the tenant has not acquired suitable residential accommodation. But while considering this question one cannot miss sight of the normal conditions obtaining in the Indian society where husband and wife with their children reside together as one unit and mess together. In my view, if section 13(1)(l) is interpreted only to mean that the tenant himself must have acquired suitable residential accommodation, then the said provision can be defeated by the tenant easily. This should not be permitted because that is not the intention of the Legislature. The object underlying this clause clearly appears that if the tenant acquires some premises, then he should be directed to vacate the tenanted premises. Even though the Rent Act is for the protection of the tenant, at the same time under the protection of the said provision the tenant cannot be permitted to do business out of the said protection."

At this stage it may be kept in mind that the suit as originally filed was against the original defendant Naranbhai Dalwadi and on his demise during the pendency of the suit, the widow and her three sons were brought on record as heirs and legal representatives of this defendant.

5.4 Thus, once it is found that the original tenant, his wife and at least some of his sons were living together as a family unit and messing together, then the acquisition of suitable residential accommodation by the wife would be considered to be acquisition of suitable residential occupation by the husband tenant.

6. Learned counsel for the petitioner has sought to draw a distinction between the property acquired by the wife in her own right to which her husband and children could not lay claim to. This is not relevant and material inasmuch as we are not concerned with the question of legal title vesting in the wife to the exclusion of the husband and her sons. It could also well be that the original tenant (the husband) could not lay any legal claim to the property owned by his wife, but so far as the property was used by the tenant and his family, or more importantly, it was available for residential use for the benefit of the entire family, it must be held that the tenant had acquired suitable

alternate accommodation.

7. It is also well settled principle that, it matters little that after acquiring such suitable accommodation the tenant or his family voluntarily choose to sell part of the property for any reason whatsoever, will not in any way detract from the fact that the tenant had in fact acquired suitable alternate accommodation.

8. Learned counsel for the petitioner had also sought to submit that even the property which is the subject matter of the present suit is not suitable for residence and/or accommodation of the defendant and his family members. It is contended that the lower appellate court has not dealt with this aspect or has dealt with it in a very unsatisfactory manner. It is further sought to be contended that this property would not be suitable for the defendants "residence" since the cellar does not have any bathroom, etc. What we are required to consider is the totality of the property, and the property as a unit and not as separate segments thereof. There is evidence on record that after the property was rebuilt as discussed hereinabove, the widow of the original tenant chose to divide the cellar into two commercial units and also chose to divide the ground floor into two commercial units and has sold away the same. This does not in any way detract from the landlord's claim that the tenant has in fact acquired suitable residential accommodation, and the fact that after such suitable accommodation has been acquired, subsequent disposal of the same at the volition of the tenant cannot defeat the claim of the landlord.

9. So far as the suitability of the same for residential purpose of the defendants' family is concerned, it may be that the language used and the approach adopted by the lower appellate court is less than ideal. However, the fact remains that the trial court has discussed the same with adequate reference to the evidentiary material on record and has arrived at a finding of fact against the defendants. In substance, the lower appellate court has upheld the findings of the trial court. I am, therefore, not inclined to permit a reagitation of the same point in the present revision.

10. I am, therefore, satisfied that there is no substance in the present revision and the same is, therefore, dismissed. Notice is discharged with no order as to costs. Interim relief stands vacated.

****